IN THE HIGH COURT OF TANZANIA

(DAR ES SALAAM SUB REGISTRY)

AT DAR ES SALAAM

CIVIL CASE NO.143 OF 2017

MIZA BAKARI HAJI ....1st PLAINTIFF

SAVELINA SILVANUS MWIJAGE..2ND PLAINTIFF

SALMA MOHAMED MWASA...3RD PLAINTIFF

RAISA ABDALLAH MUSA...4TH PLAINTIFF

RIZIKI SHAHARI MNGWALI..5TH PLAINTIFF

HADIJA SALUM ALLY-AL-QASSMY...6TH PLAINTIFF

HALIMA ALI MOHAMED..7TH PLAINTIFF

SAUMU HERI SAKALA...8TH PLAINTIFF

ELIZABETH ALATANGA MAGWAJA..9TH PLAINTIFF

LAYLA HUSSEIN MADIBI...10TH PLAINTIFF

VERSUS

THE REGISTERED TRUSTEES OF THE CIVIL

UNITED FRONT (CUF) ....1ST DEFENDANT

THE CHAIRMAN, CIVIC UNITED FRONT (CUF)......................2ND DEFENDANT

THE ACTING SECRETARY GENERAL

CIVIC UNITED FRONT (CUF)..3RD DEFENDANT

THE DIRECTOR OF ELECTIONS,

NATIONAL ELECTIONS COMMISSION (NEC)..........................4TH DEFENDANT

THE CLERK OF THE NATIONAL ASSEMBLY............................5TH DEFENDANT

TEMEKE MUNICIPAL COUNCIL...6TH DEFENDANT

UBUNGO MUNICIPAL COUNCIL..7TH DEFENDANT

RUKIA MOHAMED KASSIM..8TH DEFENDANT

SHAMSIA AZIZI MTAMBA...9TH DEFENDANT

KIZA HUSSEIN MAYEYE...10TH DEFENDANT

ZAINAB MNDOLWA AMIR...11TH DEFENDANT

HINDU HAMIS MWENDA...12TH DEFENDANT

SONIA JUMAA MAGOGO...13TH DEFENDANT
ALFREDINA APOLINARY KAHIGI...14TH DEFENDANT
NURU AWADHI BAFADHILI..15TH DEFENDANT

JUDGMENT

Last order: 2/6/2022
Date of Judgment: 12/8/2022

MASABO, J.:-

The plaintiffs in this suit were members of the Civil United Front (CUF) and through CUF, they were appointed to serve on different posts at national and ward level. The first eight plaintiffs were occupants of special seats (women) in the National Assembly and the last two plaintiffs were councillors (special seats-women) under CUF ticket. Their tenure as members of parliament (MPs) and councillors which ought to last for 5 years, reckoned from 2015 when they were appointed, was prematurely terminated following their unlawful expulsion from CUF on 24th July 2017. Resentful of the expulsion and the subsequent removal from their respective offices, they have come to this court vindicating their innocence.

They claim that the expulsion was unlawful as it was orchestrated by incompetent persons and an incompetent body namely *Baraza Kuu la*

Uongozi wa Taifa. Their further grievance is that, in total violation of the "*audi alteram partem*" rule, they were condemned unheard. They also challenge the *Baraza Kuu la Uongozi wa Taifa* for prematurely communicating their expulsion to the 4th defendant prior to exhaustion of internal appeal processes and procedure. Their grievance against the 4th and 5th defendant is for hastily endorsing the purported expulsion, declaring their seats vacant and for the subsequently appointing and administering oath of office to the 8th to 15 defendants as new occupants of the respective seats prior to the completion of the CUF's intra party appeal processes.

Save for the expulsion and the existence of an appeal process which was undisputed, the 1st, 2nd, 3rd and 8th to 15th defendant refuted all the claims and averred to have committed no wrong. Their side of the story is that, the "Baraza Kuu la Uongozi la Taifa' which terminated the plaintiff's membership was competent. It is clothed with constitutional mandate for expulsion of members. Besides, prior to the expulsion, all the plaintiffs were summoned to appear and defend themselves before the Ethics and Etiquette Committee but they declined/defaulted appearance. Thus, the "*audi alteram partem*" rule never offended. In their joint written statement of defence, the 4th and

5th defendant averred to have lawfully and diligently executed their constitutional and statutory mandate. They concluded that as their operations are neither regulated nor subject to the constitution of the CUF party, there is nothing to fault what they did.

The following seven points were framed as issues for determination:

1. Whether the purported expulsion of the plaintiffs from CUF party was in compliance with the CUF constitution hence lawful;
2. Whether the declaration of vacancy of seats of members of parliament was lawful;
3. Whether the nomination of the 8th to 15th defendants as members of parliament was lawful;
4. Whether the 5th defendant's was justified in swearing in the 8th to 15th defendants as new members of parliament;
5. Whether the expulsion of the 9th and the 10th plaintiff was in compliance with the CUF Constitution hence lawful;
6. Whether the 4th defendant was justified in endorsing the 8th to 15th defendants as members of parliament
7. To what reliefs are the parties entitled to?

Save for the 6th and 7th defendant who defaulted appearance hence an *ex parte* hearing against them, all the parties had presentation during the hearing. The 4th and 5th Defendants were represented by Ms. Alice Mtulo, learned State Attorney and, later on, by Mr. Daniel Nyakiha assisted by Ms. Debora Mcharo, learned state Attorneys. The plaintiffs were represented by Mr. Peter Kibatala, learned advocate who was assisted by Mr. Nachipyangu. On their part, the 1st, 2nd, 3rd and 8th to 15th defendants were represented by Mr. Mashaka Ngole, learned counsel.

The plaintiff's side marshalled four witnesses, Miza Bakari Hajji (PW1); Savelina Mwijage (PW2), Salma Mwassa (PW3) and Raissa Abdallah Musa (PW4). What is deductible from the noticeably identical oral testimonies of these witnesses is that, all were occupants of parliamentary special seats for women in the National Assembly, having been appointed following nomination by CUF during the 2015 national election. Their tenure was prematurely terminated following their expulsion from CUF by *Baraza Kuu la Uongozi la Taifa* on 23/7/2017. The purported expulsion was unlawful as it condemned them unheard. Their further testimony was that, they were

neither contacted, notified of the charges facing them nor formally notified of their expulsion. They learnt about it through a press release by the 2nd defendant who said they were expelled on ethical grounds. When asked about notifications purportedly communicated through their respective mobile phones, they all refuted to have seen the purported messages.

These four witnesses also blamed the 4th and 5th defendants for hurriedly endorsing the expulsion and for announcing their seats as vacant prior to the completion of intraparty appeal process and procedures. They further testified that the 3rd defendant incompetently and unlawfully proposed the nomination of the 8th to 15th defendants to fill the vacancies and the 4th defendant erroneously endorsed the list and nominated the 8th to 15th defendants as new occupants of the parliamentary seats.

In further substantiation, the plaintiff through PW1 produced the following documentary exhibits: a letter from CUF to the 5th defendant introducing PW1 as an elect MP (Exhibit p1); a letter of nomination by the 4th defendant (exhibit P2); a declaration of vacancies (Exhibit P3); a letter from CUF to the 4th defendant proposing the appointment of the 8th to 15th defendants as

occupants for the vacant seats (Exhibit P6); a letter of the 4th defendant nominating the 8th to 15th defendants as new occupants for the seats (Exhibit P5); a press release by the 4th defendant on the appointment of the 8th to 15th defendants as new members of parliament.

For the 4th and 5th defendants, DW1 Prudence Rweyongeza, Principal legal officer for 5th defendant, admitted that the 1st to the 8th defendants were MPs special seats through CUF until 23/7/2017 when the Speaker was formally informed by CUF that 1st to 8th plaintiffs' membership in CUF has ceased following their expulsion. Upon receipt of the notification, he notified the 4th defendant of the existence of vacancies and subsequently issued a public notice through Government Gazette on 26/7/2017. On 27/7/2017, the Speaker received Exhibit P5 containing names of the 8th to 15th defendant's as proposed nominees for the respective seats. He maintained that, the 5th defendant cannot be faulted as he acted in accordance with his constitutional and statutory mandate. Just as DW1, Emmanuel Kavishe, Director for Legal Services for the 4th defendant (PW2) conceded to the allegations about nominations and transmission of the nominations to the 5th defendant. But,

he maintained that the 4th defendant is blameless as what he did was within the realm of his constitutional and statutory mandate.

At the conclusion of the hearing, the parties prayed and were granted leave to file final written submissions. The defendants filed their submission whereas the plaintiff's counsel did not file any in spite of being granted a leave for enlargement of time. I have thoroughly read and considered all these submissions and I am now ready to advance to the task ahead guided by the issues for determination.

Before I delve into these issues I will, in preface, address myself to two preliminary points. The first is a point unconventionally raised by Mr. Ngole in his final submission. He observed that, the competence of the suit and the jurisdiction of this court to entertain it are questionable. Exemplifying his point, he reasoned that the issue of incompetence and jurisdiction has arisen by implication from the testimonies of the 4 witnesses who testified for the plaintiff. These witnesses, he submitted, consistently stated that there is an appeal process within CUF and that, at the time of institution of this suit they had already instituted an appeal which was still pending before CUF's

General Assembly. Thus, by implication, the suit was prematurely filed in this court prior to exhaustion of the internal remedies and by further implication, this court is devoid of jurisdiction to entertain the suit.

Much as this point was improperly raised from the bar and was not supported by any law, I have found it prudent to resolve it. I did so mindful of the cardinal principle that jurisdiction of court is not simply one of technicality but a fundamental issue which need be ascertained at the outset. As held in **Fanuel Mantiri Ng'unda v. Herman M Ngunda**, Civil Appeal No. 8 of 1995, CAT (unreported):

> "The jurisdiction of any court is basic, it goes to the very root of the authority of the court to adjudicate upon cases of different nature....the question of jurisdiction is so fundamental that courts must as a matter of practice on the face of it be certain and assured of their jurisdictional position at the commencement of the trial."

Cementing this position in **Salim O. Kabora vs Tanesco Ltd & Others**, Civil Appeal 55 of 2014 (unreported) the Court of Appeal stressed that since the issue of jurisdiction:

> "......... dwells into the determination of any matter brought before it, it is elementary that it should, in the first place, satisfy itself that it has the requisite mandate to determine the matter."

My inclination and choice are further fortified by the liberal approach to belatedly raised points of jurisdiction. It is now settled that, position that, because of its very nature, a point on jurisdiction can be belatedly raised and determined at any stage of the suit even on appeal (see **M/S Tanzania China Friendship Textile Co. Ltd v. Our Lady of the Usambara Sisters** [2006] TLR70 and **Tanzania Revenue Authority vs Tango Transport Company Ltd**, Civil Appeal No. 84 of 2009).

Thus guided, I invited the parties to address the court. Addressing the court, Mr. Kibatala, conceded that in deed there exist an appeal process within CUF. However, he argued that, much as the doctrine of exhaustion of internal remedies is well established and it is impliedly relevant to the case at hand, the doctrine is not without exceptions and one of the exceptions is where the internal remedy is ineffective. He proceeded that in the present case it

is implicitly clear from the evidence rendered by the plaintiffs that the internal remedy was ineffective as at the material time CUF had split into two contending parts one recognised by the plaintiff and the other one unlawfully run by the 1st to the 3rd defendants and their allies. In the alternative, he argued that, the amended plaint was filed after revocation of the plaintiffs' parliamentary positions and appointment of the 8th to 15th defendants. Hence, the appeal had become inoperative as the appellate body could not competently give the reliefs sought in court by the plaintiffs. On his part, Mr. Ngole maintained that the suit was prematurely filed before the appeal process from which the cause of action ought to have arisen.

The common law doctrine of exhaustion of remedies is prominent in domestic and international arena. In international arena, it acts as bar to the institution of actions in international courts and tribunals before exhausting the remedies available at national level. At domestic level, which is relevant in our case, the doctrine of exhaustion of remedies, underscores that courts should not entertain suits unless the available administrative remedies have first been resorted to and the proper authorities, who are competent to act upon the matter complained of, have been given the appropriate opportunity

to act and correct their alleged errors, if any. Highlighting the rationale of this principle, the Constitutional Court of South Africa in **Wycliffe Simiyu Koyabe & 2 Others v Minister for Home Affairs and 2 Others** [2009] ZACC 23 underlined that,

> Internal remedies are designed to provide immediate and cost-effective relief, giving the executive the opportunity to utilise its own mechanisms, rectifying irregularities first, before aggrieved parties resort to litigation. Although courts play a vital role in providing litigants with access to justice, the importance of more readily available and cost-effective internal remedies cannot be gainsaid
> [36] First, approaching a court before the higher administrative body is given the opportunity to exhaust its own existing mechanisms undermines the autonomy of the administrative process. It renders the judicial process premature, effectively usurping the executive role and function."

The Court of Appeal of Kenya made a similar observation in **Geoffrey Muthinja & another v Samuel Muguna Henry & 1756 others** (2015) eKLR, when it stated that:

> "It is imperative that where a dispute resolution mechanism exists outside Courts, the same be exhausted before the

> jurisdiction of the Courts is invoked. Courts ought to be the fora of last resort and not the first port of call the moment a storm brews… as is bound to happen. The exhaustion doctrine is a sound one and serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is first of all diligent in the protection of his own interest within the mechanisms in place for resolution outside of Courts."

Turning to the present case, there are two developments worth noting from the proceedings as they will overwhelmingly inform my approach to the point at hand. *First,* the point on jurisdiction is not alien to the proceedings of the present suit. It has been raised for a second time and by the same party. At first, it was raised as a preliminary objection during the preliminary stage of the suit but it was not determined on merit for being inconceivably raised as preliminary objection whereas it encompasses a mixture of factual and legal issues. Hence, incompatible with the cardinal principle of preliminary objections which requires that they be confined on pure points of law as opposed to facts or mixture of facts and law (see **Mukisa Biscuits Manufacturing Company LTD v West End Distributors LTD** (1969) EA 696, **Shahida Abdul Hassamali Kassam v. Mahed Mohamed Gulamali**

Kanji, Civil Application No. 42 of 1999, CAT (unreported); and **Hezron M. Nyachiya Vs. 1. Tanzania Union of Industrial and Commercial Workers, 2. Organization of Tanzania Workers Union** Civil Appeal No. 79 of 2001, CAT (unreported).

Second, there is already a judgment on admission in respect of paragraphs 16, 17 and 19 of the amended plaint. The judgment was pronounced by this court on 25/3/2019 after it was moved by the plaintiffs' counsel to enter a judgment on admission in respect of these three paragraphs which I reproduce below for reference purposes only:

> 16: The CUF's party constitution provides for an appellate process against the decision of the Baraza Kuu Body to Mkutano Mkuu body; which appellate process plaintiffs have invoked vide annexture TAL-2- an appeal to the Mkutano Mkuu.
> 17: That, this appellate process has not yet matured in that the Mkutano Mkuu body has not yet been convened by CUF Party.
> 19. That the 1st, 2nd and 3rd Respondents have purported not only to call a press Conference vide which they announced plaintiff's expulsion from CUF party, but have also purported to communicate plaintiff's expulsion from

CUF party, The Press release announcing the plaintiff's purported expulsion is annexed as **Annexture TAL-3**

In the foregoing, it is vivid that the belatedly raised point on jurisdiction cannot be competently addressed by this court at this stage. The judgment on admission implicitly suggests that this court has become *functus officio* as it has already assumed jurisdiction and partly determined the suit. Hence, it is no longer open for this court to entertain the matter because, in doing so, it would risk exercising review powers or usurping appellate powers over its decision. As this court is not sitting on review, I entirely agree with Mr. Kibatala that, this court cannot competently entertain the matter as it has become *functus officio*. Accordingly, I put it to rest.

The second issue I would like to address, concerns the fate of the plaintiffs who did not appear in court to testify in proof of their claims. As the title reveals, there were a total of 10 plaintiffs in this suit. These were into two groups. The first 8 plaintiffs were challenging their expulsion from CUF and termination of their seats as MPs while the last two. The last two were not MPs. They were councillors. Their grievances sightly differed with the first 8

plaintiffs in that, in addition to challenging their expulsion from CUF, they were challenging their termination from their positions as councillors.

It is trite that, the legal and evidential burden of proof rests upon the person who asserts existence of certain facts (see section 110 to 112 of the Evidence Act [Cap 11 RE 2019] also see **Jasson Samson Rweikiza v Novatus Rwechungura Nkwama,** Civil Appeal No. 305 of 2020, CAT (unreported)). Going by this principle, the duty rested upon the plaintiffs to prove that, their expulsion from CUF was unlawful. For the 1st to 8th plaintiffs, it was incumbent to prove further that, their termination from MPs position was unlawful and for the last two plaintiffs that, their termination as councillors was similarly unlawful.

Unexpectedly, out of the 8 plaintiffs in the first group, only four plaintiffs, namely 1 Miza Bakari Haji (1st plaintiff), Savelina Mwijage (2nd plaintiff); Salma Mwasa (3rd plaintiff), and Raissa Abdallah Musa (4th plaintiff) appeared in court as witnesses. The rest 4, Riziki Shahari Mngwali (5th plaintiff) Hadija Salum Ally-Al-Qassmy (6th plaintiff), Halima Ali Mohamed (7th plaintiff) and Saum Heri Sakala (8th plaintiff) did not show up as witness and so were the

plaintiffs in the second group, that is, Elizabeth Alatanga Magwaja (9th plaintiff) and Layla Hussein Madibi (10th plaintiff). It is pertinent that the fate of these six plaintiffs be determined at the outset.

Luckily, our jurisprudence is devoid of a lacuna in this area. The decision of the Court of Appeal in **NAFCO v Mulbadaw Village and Others [1985] TLR 88** and **Haruna Mpangaos & Others vs Tanzania Portland Cement Co. Ltd** (Civil Appeal 129 of 2008) and the decision of this court in **John Siringo And 20 Others V Tanzania National Roads Agency 1st Defendant 2. Honorable The Attorney General**, Land Case No. 2 of 2019, HC at Musoma (unreported) extensively dealt with this issue. Just as in the present case, in all these three matters, there were several plaintiffs but only a few of them appeared as witness while the rest absconded.

Cementing the position, it has set in the N**AFCO v Mulbadaw Village and Others** (Supra) the Court of Appeal had this to say in **Haruna Mpangaos & Others vs Tanzania Portland Cement Co. Ltd** (Civil Appeal 129 of 2008:

Since the land is not jointly owned by all the appellants, and since it is them in their individual capacities who claimed to have a better title than the respondent and as that is one of the issues raised in the suit, in terms of O.XVIII Rule 3 of the Civil Procedure Code Cap.33 it was the duty of each appellant and not someone else to testify and prove on balance of probabilities that the disputed land belonged to each individual. That was not done. Only 13 gave evidence. In actual fact even those 13 appellants did not testify for and on behalf of 920 which is not proper either, if they had happened to do that.

In **Nafco v Mulbadaw Village and Others [1985] TLR 88** this Court, held, inter alia, we quote.

> " There is no evidence as to when each villager had occupied or was in possession of the land,.... In any event each villager had to prove his own case. Each claim is different from the other, in terms of date of possession, of acreage, of the method of acquisition, and so on. They were individual claims. A person may act and represent another person, but we know of no law or legal enactment which can permit another person to testify in place of another."

As there is no evidence coming from 920 appellants to assert their rights over the land, it is very difficult to sustain their claim.

In third case, **John Siringo And 20 Others V Tanzania National Roads Agency & Another** (supra), Galeba J (as he then was) said the following in respect of 9 plaintiffs who did not turn up to testify in support of their claims:

> That aside; the principle of law is that a plaint or a claim is a statement of complaint and it is not evidence, it is not made on oath and it cannot support a claim it contains or even prove it. It has ultimately to be proved. For a relief to be granted it must be proved. If it is not, legally it is not awardable. It must fail. In this case, those who were appointed did not speak for anybody else, every one of them testified how he or she got his or her land not any other person's. In respect of the nine (9) plaintiffs who did not appear to testify, there was no evidence tendered to demonstrate or prove how and when they got their respective pieces of land. Briefly their cases were not proved.

Fortified by these authorities and the cardinal law as regards the legal and evidential burden of proof, I find no difficulty in holding that, save for averments in paragraphs 16, 17 and 19 of the amended plaint to which there is already a judgment on admission, the suit in respect of 5th to 10th plaintiffs stands dismissed for want of proof.

Having resolved these two points I will now proceed to the issues for determination starting with the first and fifth issue through which the parties are contending over the constitutionality of their expulsion from CUF. Though PW1 to PW4, it was contended that the expulsion was marred by multiple irregularities encompassing among others: (i) failure to notify the plaintiff of the charges against them or the ongoing proceedings; (ii) failure to accord them the right to be heard; (iii) failure to avail them formal notification of the verdict and the reason thereto and (iv) the body that expelled was incompetent. For the 1st, 2nd and 3rd defendant, it was deponed through DW3, DW4 and DW5 that, there was strict compliance with CUF constitution. *Baraza Kuu la Uongozi la Taifa* is clothed with the requisite mandate, was duly constituted and according to DW5, it correctly exercised its mandate under the CUF constitution.

Disputing the procedural impropriety, these three witnesses maintained that, there were neither irregularities nor any impropriety as before the expulsion, the plaintiffs were called to appear before the Ethics and Disciplinary Committee but they refused. Corroborating DW3 testimony, DW4 confirmed to have personally phoned the plaintiffs and to have dispatched to their

respective mobile phone numbers short messages on 22/7/2017 informing them that they were required to appear before the Ethics and Disciplinary Committee on 23/7/2017. In further fortification, he produced a printout of the message he purportedly sent to the plaintiffs which were received as Exhibit D1. He proceeded that, save for the 9th plaintiff who responded with an unpleasant message, all the plaintiffs muted and did not turn up for the meeting. However, apart from the purported notification of the Ethics and Disciplinary Committee, this witness had no clue on whether there were notifications in respect of the meeting the *Baraza Kuu la Uongozi la Taifa* whose decision is the kernel of this suit. According to this witness, the plaintiffs were expelled from CUF for plotting and making monetary contributions for removal of the CUF Chairman, Professor Ibrahim Haruna Lipumba.

Political parties such as CUF Party and other voluntary association have constitutions which are essentially the lifeblood of the respective political party as they guide the respective party in dispensation of its business in an organised and orderly manner. Membership, the rights and obligations of members all tend to be derived from the constitution and so are all the affairs

of the party including election of office bearers, their powers and responsibilities and decision-making processes. Intra party disputes, such as the contested expulsion of members, are naturally be resolved with reference to the constitution of the respective party. For this reason, the constitution of CUF which was admitted as Exhibit D2 is of paramount significance in resolving the controversy in the first and fifth issues.

From the CUF constitution, it is gathered that CUF has two parallel procedures for expulsion of members. The first caters for ordinary members and the second is for members holding leadership positions. The later which is relevant in the present case falls under the mandate of *Baraza Kuu la Uongozi wa Taifa* and the National General Assembly. These two bodies derive their mandate from clause 10 (1)(c) and (5) of the constitution which provide as follows:

> 10 (1) Mwanachama yeyote atasita kuwa mwanachama ikiwa:
>
> a) n/a
>
> b) n/a
>
> c) atafutwa au kuachishwa uanachama na Mkutano Mkuu wa Taifa au Baraza Kuu la Uongozi la Taifa kwa mujibu wa masharti ya katiba hii.

(5) mwanachama yeyete ambaye ana wadhifa katika Chama au serikali (Kiongozi kwa tiketi ya chama) anaweza kuachiwa uanachama au kufukuzwa uanachama na Baraza Kuu la Uongozi wa Taifa au Mkutano Mkuu wa Taifa kwa mujibu wa masharti ya Katiba hii

When these two paragraphs are read conjointly with clause 79(2) and 83(4) and (5) and (6) they entertain no doubt that *Baraza Kuu la Uongozi la Taifa* and the General Assembly enjoy concurrent jurisdiction in expulsion of members holding leadership within the party and those holding government leadership positions under CUF sponsorship. In the foregoing, since there is no dispute that the 1st to the 4th plaintiffs were bearers of government leadership positions under CUF sponsorship, their averment that *Baraza Kuu la Uongozi la Taifa* was not clothed with the requisite mandate for their expulsion from CUF is self-defeated and devoid of merit.

As there is already a judgment on the appellate processes which ought to have been the next point for consideration, I will not proceed on this further. I will also make no finding on the composition of the *Baraza la Kuu la Uongozi wa Taifa* as, apart from barely asserting that the 3rd defendant was illegally

acting as deputy secretary, the court was not presented with any material from which to derive a finding in favour of the plaintiff's averments that *Baraza Kuu la Uongozi wa Taifa* was improperly constituted when it exercised its expulsion mandate or that, the 3rd defendant had no mandate to serve in the capacity of Acting Secretary General as the Secretary General was present.

Turning to the alleged procedural improprieties, as emphatically stated by the Supreme Court of Canada in **Baker vs. Canada (Minister of Citizenship & Immigration)** 2 S.C.R. 817**:**

> **"**The values underlying the duty of procedural fairness relate to the principle that the individual or individuals affected should have the opportunity to present their case fully and fairly, and have decision affecting their rights, interests, or privileges made using a fair, impartial and open process, appropriate to the statutory, institutional and social context of the decisions."

In the present case, the plaintiffs have fervently contended that they were denied the right to be heard hence condemned unheard. Principally, the right to be heard, or, the *audi alteram partem* rule, requires that no man shall be

condemned unheard. It literally demands that a person against whom an order to his prejudice may be passed should be informed of the allegation and charges against him, be given adequate opportunity of submitting his defence and to know the material by which the matter is proposed to be decided against him. Exemplifying this rule, The ***Halsbury's Laws of England***, 5th Edn. Vol. 61 page 545 at para 640 states:

> "The ***audi alteram partem*** rule requires that those who are likely to be directly affected by the outcome should be given prior notification of the action proposed to be taken, of the time and place of any hearing that is to be conducted, and of the charge or case they will be called upon to meet. Similar notice ought to be given of a change in the original date and time, or of an adjourned hearing…The particulars set out in the notice should be sufficiently explicit to enable the interested parties to understand the case they have to meet and to prepare their answer and their own cases."

The principle is deeply entrenched in our jurisdiction as espoused by the Court of Appeal of Tanzania in a plethora of authorities. In **Mbeya-Rukwa Autoparts and Transport Ltd. v. Jestina George Mwakyoma** [2003] TLR 251 where the Court of Appeal explicitly stated that:

> It is a cardinal principle of natural justice that a person should not be condemned unheard but fair procedure demands that both sides should be heard: *audi alteram partem.* In *Ridge* v. *Baldwin* (5), the leading English case on the subject, it was held that a power which affects rights must be exercised judicially, ie fairly. We agree and therefore hold that it is not a fair and judicious exercise of power, but a negation of justice, where a party is denied a hearing before its rights are taken away. As similarly stated by Lord Morris in *Furnell* v. *Whangarei High School Board* (6) at page 679, "Natural justice is but fairness writ large and judicially."

The Court proceeded further that:

> "In this country, natural justice is not merely a principle of the common law, it has become a fundamental constitutional right. Article 13(6)(a) includes the right to be heard among the attributes of equality before the law."

Also see A**bbas Sherally & Another v. Abdul S. H. M. Fazalbay,** Civil Application No. 33 of 2002; **I.P.T.L. v. Standard Chartered Bank (Hongkong) Ltd**, Civil Revision No.1 of 2009 (unreported); **Elizabeth Mpoki, Noel Masima & Daniel Mlacha v MAF Europe Dodoma**, Civil Application No. 436/1 of 2016, and **Onesmo Nangole vs Dr. Sterven**

Lemomo Kiruswa, Civil Appeal 129 of 2016, CAT (all unreported). The CUF is not oblivious to this principle. It enshrines the right to be heard under clause 11.6 of its constitution under which it explicitly states that:

> "Kila mwanachama atakuwa na haki zifuatazo:
> (6) Kusikilizwa mbele ya chombo chochote cha chama kinachotaka kumchukulia hatua za nidhamu dhidi yake...."

The right to be heard, enshrined in this clause and in the authorities above cited, encompasses twin principles, that is, the right to be informed of the case and fair opportunity to the person charged/accused to tell his story to correct or contradict any relevant statement prejudicial. The first demands that a party liable to be directly affected by the outcome of the decision be given prior notification and adequately appraised of the charges facing him, the proposed day, time, and place of hearing well ahead of time to enable him to prepare his defence. And, the second, underscores the importance of the accused person to face his accuser and controvert his story by questioning him. This was well espoused in **Simeoni Manyaki v Institute of Finance Management** [1984] TLR 304 where it was held that:

> [T]he applicant, whose rights and legitimate expectations stood to be so adversely affected by the inquiry <u>had the right to have an adequate opportunity of</u>

> knowing the case he had to meet, of answering it, of putting forward his own case, and of being fairly and impartially treated. In other words, he had the right, first, of being sufficiently appraised of the particulars of the prejudicial allegations that were to be made or had been made against him, so that he could effectively prepare his answer and collect evidence necessary to rebut the case against him; ………., of being accorded sufficient opportunity of controverting or commenting on the materials that had been tendered or were to be tendered against him; presenting his own case; and ….. being given a reasonable and fair deal.

The ascending question for interrogation is whether the plaintiff was accorded the right to be heard prior to the expulsion. The plaintiff's case is that, the twin principle encompassed in the *audi alteram partem* was violated meaning that they were neither notified and appraised of the charges against them nor allowed to face their accusers, question them and controvert their story. Violation of the second part of the principle was basically undisputed as it was not controverted that the proceedings before the *Baraza Kuu la Uongozi la Taifa* proceeded *ex parte* the plaintiffs. The parties have locked their horns on the reasons for the *ex parte* proceedings a controversy which fundamentally deals with the first part of the rule.

For the plaintiffs' it was asserted through PW1, PW2, PW3 and PW4 that in total denial of their right to be heard, they were furnished neither with the notification for the meeting nor appraised of the charges facing them. Inversely, for the 1st to the 3rd defendant's side, it was asserted through DW3, DW4 that the plaintiff was furnished with a notice specifying the date, venue and time of the meeting of the *Baraza Kuu la Uongozi la Taifa* and its sub-committee, the Ethics and Disciplinary Committee, but they declined. Through these witnesses and Exhibit D1, it has been further asserted that the notification sent to the plaintiff through mobile phone short messages sufficiently appraised the plaintiffs as it set out in specific terms the charges against them and divulged sufficient information to enable them to prepare their respective defence. But, save for Mgeni Jadi Kadika, who sent an apology, the plaintiffs muted and defaulted appearance. Hence, forfeited their right to be heard.

Upon scrutiny of the evidence produced by both parties, I have found the evidence presented in support of the assertion of the 1st to the 3rd defendants' case highly improbable. DW3 and DW4 oral testimony entertain no doubt that the purported notice was for a meeting of the Ethics and

Disciplinary Committee which preceded the meeting of the *Baraza Kuu la Uongozi la Taifa.* Exhibit D1, containing the printout of the notice styled in a form of a short messages purportedly sent to the plaintiffs' mobile numbers by DW4 bears the following identical content:

> "Mh..., nimeagizwa na katibu wa kamati ya ulinzi na usalama CUF Taifa kukuagiza kuhudhuria kikao cha kamati ya maadili na nidhamu kujibu tuhuma zinazokukabili juu ya kufanya vikao vya kukihujumu chama, unatakiwa ufike siku ya jumapili tarehe 23-7-2017 saa tatu asubuhi Afisi Kuu Buguruni DSM, Ni matumaini yangu utatoa ushirikiano wako, Haki sawa kwa wote, Masoud Mhina Omar Naibu katibu kamati ya ulinzi na usalama CUF Taifa [Underlining mine]

Admittedly, this self-explanatory message is incapable of any interpretation other than that the purported notice was in respect of the meeting of the Disciplinary and Ethics Committee and not the *Baraza Kuu la Uongozi la Taifa* which terminated the plaintiffs' membership. These two are distinct bodies. Established under clause 99 of the CUF constitution, the Ethics and Displinary Committee is subordinate to the *Baraza Kuu la Uongozi la Taifa*. It is vested with primary mandate over all disciplinary and ethics related matters. As per

DW3, DW4 and DW5, ethics and disciplinary matters that remain unresolved in the Committee go to *Baraza Kuu la Uongozi la Taifa* for further actions. In the present case, the charges were deliberated upon the Ethics and Disciplinary Committee which forwarded its resolutions and recommended actions to *Baraza Kuu la Uongozi la Taifa* the deliberation of which transcended into the plaintiff's expulsion from CUF. Needless to emphasize, as the Ethics Committee and *Baraza Kuu la Uongozi la Taifa* are two distinct bodies, the purported notification cannot be said to have carted for both. In the foregoing, I am inclined to hold, as I outright do, that *Baraza Kuu la Uongozi la Taifa* offended the provision of clause 11.6 of the CUF constitution which underlines the need for members to be accorded the right to be heard in all intra party disciplinary bodies. It also offended the *audi alteram partem* rule.

For completeness's sake, assuming that the notification sufficiently carted for both, would the notice (Exhibit D1) attract any weight? The answer is certainly in the negative as no court would append any weight to the printout whose credibility is highly questionable. From the available evidence it cannot be told with precision that the messages were dispatched from DW4's

phone and received by the plaintiffs. There was no verification of registration of the sender and recipients' numbers to corroborate DW4's testimony which under the circumstances of the case could not, in the absence of an independent credible corroboration, sufficiently ground a finding that indeed the messages were sent and delivered to the plaintiff. It need not be overstated that, as this point was highly contentious between the parties, it was crucial for DW4's oral narration to be corroborated by verification of registration of the disputed mobile numbers. As the verification could have easily been obtained from the 'Know Your Customers' database kept by mobile phone operators, the omission to produce it is inexcusable and leans prominently towards the plaintiff's claims that they were neither notified nor appraised of the charges facing them.

Lastly on this point is the unfolding consequences. The law is settled that the omission to accord the parties the right to be heard before a decision adverse to their interests is made is a fatal anomaly as it renders the decision nullity. In A**bbas Sherally & Another v. Abdul S. H. M. Fazalbay,** Civil Application No. 33 of 2002 (unreported) the Court of Appeal held that:

"The right of a party to be heard before adverse action or decision is taken against such a party has been stated and emphasized by the courts in numerous decisions. That right is so basic that a decision which is arrived at in violation of it shall be nullified, even if the same decision would have been reached had the party been heard, because the violation is considered to be a breach of natural justice. Also see **Elizabeth Mpoki, Noel Masima & Daniel Mlacha v MAF Europe Dodoma**, Civil Application No. 436/1 of 2016, CAT

The Court of Appeal of Eastern Africa had a similar view in **Onyago Oloo vs Attorney General (1986 -1989) EA 456** where it stated that:

"the principle of natural Justice applies where ordinary people would reasonable expect those making decisions which will affect others to act fairly and they cannot act fairly and be seen to acted fairly without giving an opportunity to be heard ... a decision in breach of the rules of natural Justice is not cured by holding that the decision would have otherwise been right since if the principle of natural justice is violated, it matters not that the same decision would have been arrived at..."

Based on what have demonstrated, the first question for determination is affirmatively answered and it is declare that, the expulsion of the plaintiff from CUF was as offensive of clause 11(6) of the CUF constitution and the *audi alteram partem* rule.

Needless to emphasize more, the *audi alteram partem* rule knows no exclusion or boundaries. Being a rule of natural justice, it cuts across the spectrum and binds all public and private bodies/person charged with decision making roles. As elucidated by the Court of Appeal in **I.P.T.L. v. Standard Chartered Bank (Hongkong) Ltd**, Civil Revision No.1 of 2009 (unreported), it binds any court of justice/ body or authority entrusted with the power to determine rights and duties so as to adversely affect the interests of any person. And, as correctly observed a century ago by **Lord Loreburn LC** in **Board of Education vs. Rice [1911] AC 179**, it is "a duty lying upon everyone who decides anything." Thus, even if the CUF constitution was mute of the right to be heard, its *Baraza Kuu la Uongozi la Taifa* would still be liable for offending the *audi alteram partem* rule.

Turning to the 2nd, 3rd, 4th and 6th issue which I prefer to consolidate as they are closely related, the parties are at common that the expulsion of the plaintiff from CUF is the sole reason for their premature termination from National Assembly. When the evidence is assessed as a whole, it becomes clearer that the Speaker of the National Assembly caused the publication of the Declaration for Vacancies of the Seats occupied by the plaintiffs (Exhibit P3) after receipt of a notification of the purported expulsion by CUF authorities. It is also gathered through exhibit P5 that, subsequent to the public notice, the Speaker formally notified the National Elections Commission of the existence of the vacancies. It is further gathered from exhibit P6 that upon receipt of the notification, the 4th defendant by a letter dated 27th July 2017 bearing a reference No. CBA/196/196/01/A/32 requested CUF to furnish him a list of candidates eligible for nomination. On the same day, CUF, through (Exhibit P6), furnished the lists bearing the names of the 8th to 15th defendants as recommended candidate. As per exhibit P4 and P5, the names were endorsed. The 8th to 15th defendants were forthwith nominated as new occupants of the special seats and their names transmitted to the 5th defendant.

The parties' controversy regards the legality of these procedures and processes. For the plaintiff's it has been ardently asserted through PW1, PW2, PW3 and PW4 that, the procedure and processes above were a nullity as they were predicated on nullity order. For the 4th and 5th defendant, it was maintained through DW1 and DW2 that they committed no wrong as they dutifully exercised their legal mandate upon receipt of a notification from CUF. It has been averred further that, the existence of an appeal process being an intra-party process has no bearing on the exercise of the 4th and 5th defendant's constitutional/statutory mandate considering also that none of these two was notified of the pendency of appeal if any.

Nomination and election of members of parliament in our jurisdiction is constitutionally clipped on political party membership. A person vying for a parliamentary seat cannot do so independently without sponsorship of a political party. As per Article 67(1) (b) of the Constitution of the United Republic of Tanzania, 1977, membership in a political party is a conditional precedent for election or appointment as Member of Parliament. Impliedly, cessation of membership in a party on whose sponsorship a Member of Parliament was elected or nominated automatically disqualifies the

respective member from holding the seat and in the consequence thereof, cultivates a fertile ground for the 5th defendant to invoke his statutory powers prescribed under section 37(3) of the National Elections Act, Cap 343 which states that:

> Where a Member of Parliament resigns, dies or otherwise relinquishes his office for reasons other than under section 113, the Speaker shall, in writing to the Chairman of the Commission, and by notice published in the Gazette, declare that there is a vacancy in the seat of a Member of Parliament." [emphasis added]

As alluded to earlier on, membership in any political party is an internal affair regulated by the respective political party's constitution, rules and practices to which, neither the 4th defendant nor the 5th defendant has any control. Thus, when an MP's membership in the political party on whose sponsorship he was elected or nominated ceases by expulsion or otherwise and the cessation is communicated to the Speaker, the Speaker is statutorily bound to notify the 4th defendant and to publicize the vacancy in the Gazette. Unless there is a notification to the contrary or a court order restraining the 5th defendant from acting on a notification received from the political party, the 5th defendant cannot be faulted for acting on the notification and for issuing

a public notice of the vacancy. Therefore, since it was uncontroverted that the 5th defendant's declaration of vacancies (Exhibit P3) and notification to the 4th defendant were issued after receipt of notification from the CUF party and there was no notification to the contrary or a court order restraining him from acting on the notification so received, there is certainly no reason to blame the 5th defendant as his deeds was in tandem with his statutory mandate as stipulated under. The second issue is consequently answered in the affirmative.

The 3rd, 4th and 6th issues for determination will not detain me. Just as night follows day, having found that the 5th defendant acted lawfully in declaring the vacancies and notifying the 4th defendant of the existing vacancies, the 4th defendant cannot be faulted for initiating the nomination exercise and for endorsing and formally nominating the 8th to 15th defendants as new occupants of the vacant parliamentary seats. In performing these functions, the 4th defendant dutifully executed his constitutional and statutory mandate clothes in him by Article 78 (4) of the Constitution of the United Republic of Tanzania, 1977 and section and 86A (8) of the 86A (8) of the National

Elections Act, Cap 343 RE 2002 which stipulates the procedure for filling women special seats which become vacant during the life of the Parliament.

As, save for the contention I have resolved while dealing with the 2nd issues, there was neither complaint nor proof of procedural irregularities in the exercise of these mandate by the 4th and the 5th defendant, these three issues are all answered positively. Needless to emphasize, it is a cherished principle of law that, in civil proceedings, the burden of proof lies on the person who alleges existence of a certain fact and who wants the court to believe the existence of such fact and to give judgment in her favour. It is similarly cardinal that, the court will sustain such evidence which is more credible than the other on a particular fact to be proved (see **Godfrey Sayi v. Anna Siame as Legal Personal Representative of the late Marry Mndolwa,** Civil Appeal No. 114 of 2012 (unreported). The plaintiffs in this case were not only duty bound to prove that their expulsion from CUF was unlawful. A corresponding duty rested upon them to prove on the balance of probabilities that the 4th and 5th defendant acted contrary to their statutory mandate a duty which they have miserably failed to discharge.

The last issue is on reliefs. The plaintiffs' prayers in the amended plaint are for:

1. Declaration that the purported expulsion of the Plaintiffs from the CUF is null and void for failure to observe rules of natural justice;
2. Declaratory Orders that the communication of the purported expulsion to the Public by the 2nd Defendant is null and void for violating the Plaintiff's rights of appeal duly enshrined in the CUF Constitution, and for want of Intra – Party Jurisdiction;
3. Declaration that 3rd Defendant did not have the mandate nor authority to communicate to the Speaker of Parliament the purported expulsion of the Plaintiffs herein for there is as substantive Secretary General of CUF in office;
4. Declaration that the communication of the purported expulsion is null and void for being res Sub judice the Appellate process undertaken by the Plaintiff to the CUF Mkutano Mkuu;
5. Declaratory Orders that the entire disciplinary process at whose conclusion the Plaintiffs were purportedly expelled from the CUF Party was null and void for being in violation of the tenet on right to be heard and principles of law relating to service of charges that

affect a member's rights and for going contrary to the principle of legitimate expectations, natural justice and for being arbitrary;

6. Permanent injunctive orders restraining the 1st, 2nd and 3rd Defendants from interfering in any way or manner with the Plaintiffs' membership of CUF Party unless and until they fully comply with the Constitution of CUF and to all rules of natural justice;
7. Declaration that the 6th Defendants acted too hastily in taking steps to validate the decision by the 1st, 2nd and 3rd Defendants to expel the Plaintiffs herein from the CUF Party without satisfying themselves as to the full compliance by the said 1st, 2nd and 3rd Defendants of all rules of natural justice and of exhaustion of internal CUF Party Appellate processes;
8. Declaration that the nomination of the 8th – 15th Defendants as Members of Parliament (special seats) via the CUF Party to replace the 1st – 8th Plaintiffs herein is null and void for having stemmed and emanating from a void process that violated the Plaintiff's rights to be heard and the CUF Appellate processes;
9. Declaration that the 6th and 7th Defendants herein should not take any steps to replace the 9th and 10th Plaintiffs herein until and unless

the 1st, 2nd and 3rd Defendants herein have fully complied with the CUF Party Constitution which provides for right to be heard and for exhaustive Appellate processes

10. For payment of the costs of the case.

11. Any other order the Hon. Court will deem just and fit to grant.

As demonstrated in the course of determining the presiding issues, the 1st to 4th plaintiffs have ably proved the illegality of their expulsion from CUF which was the basis for the 1st, 2nd, 4th and 5th prayers. On the other hand, they have failed to prove their averments in support of their claims against the 4th and 5th defendant which were the basis for the 7th and 8th prayers. In the upshot and in avoidance of repetition, the suit party succeeds to the following extent:

1. The expulsion of the 1st to 4th defendants from the CUF Party was illegal and is hereby nullified for offending the plaintiffs' right to be heard;
2. The 1st, 2nd and 3rd Defendants are refrained from interfering with the 1st to the 4th plaintiff's membership in the CUF Party unless and until they fully comply with the constitution of CUF and the rules of natural justice.

3. All the claims against the 4th and 5th defendants are dismissed.
4. Save for the averments in paragraph 16, 17 and 19 of the plaint, the 5th to 10th plaintiffs' case is dismissed for want of proof.
5. Considering the nature of the suit and the partially success attained, it is fair and just that the costs incidental to the suit be shared by each of the parties shouldering its respective costs.

DATED at **DAR ES SALAAM** this 12th day of August 2022

X

Signed by: J.L.MASABO

J. L. MASABO

JUDGE